

## M E M O R A N D U M

**TO:** John Madras

**FROM:** Timothy P. Duggan, Assistant Attorney General

**DATE:** August 5, 2003

**SUBJECT:** Scope of Rules

You have provided to the workgroup a survey, in the form of a chart, and you have asked the members to indicate whether each item on the chart should be classified as suitable for inclusion in a “guidance” document, a “rule,” or a new or amended statute. You asked me to provide legal guidance.

Any agency statement that is intended to have the force and effect of law must be authorized by statute and promulgated as a “rule” according to the procedures set forth in Chapter 536 of the Revised Statutes of Missouri, (a.k.a. the Missouri Administrative Procedure Act, or MAPA) and any other applicable statutes. The term “rule” is defined at § 536.010(4), RSMo. A copy of the definition follows. [Note that the definition has thirteen exclusions, set forth in subsections lettered (a) through (m).]

(4) **"Rule"** means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of an existing rule, but does not include:

- (a) A statement concerning only the internal management of an agency and which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof;
- (b) A declaratory ruling issued pursuant to section 536.050, or an interpretation issued by an agency with respect to a specific set of facts and intended to apply only to that specific set of facts;
- (c) An intergovernmental, interagency, or intraagency memorandum,

directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof;

- (d) A determination, decision, or order in a contested case;
- (e) An opinion of the attorney general;
- (f) Those portions of staff manuals, instructions or other statements issued by an agency which set forth criteria or guidelines to be used by its staff in auditing, in making inspections, in settling commercial disputes or negotiating commercial arrangements, or in the selection or handling of cases, such as operational tactics or allowable tolerances or criteria for the defense, prosecution, or settlement of cases, when the disclosure of such statements would enable law violators to avoid detection, facilitate disregard of requirements imposed by law, or give a clearly improper advantage to persons who are in an adverse position to the state;
- (g) A specification of the prices to be charged for goods or services sold by an agency as distinguished from a license fee, or other fees;
- (h) A statement concerning only the physical servicing, maintenance or care of publicly owned or operated facilities or property;
- (i) A statement relating to the use of a particular publicly owned or operated facility or property, the substance of which is indicated to the public by means of signs or signals;
- (j) A decision by an agency not to exercise a discretionary power;
- (k) A statement concerning only inmates of an institution under the control of the department of corrections and human resources or the division of youth services, students enrolled in an educational institution, or clients of a health care facility, when issued by such an agency;
- (l) Statements or requirements establishing the conditions under which persons may participate in exhibitions, fairs or similar activities, managed by the state or an agency of the state;
- (m) Income tax or sales forms, returns and instruction booklets prepared by the state department of revenue for distribution to taxpayers for use in preparing tax returns.

Missouri appellate courts have provided some guidance concerning when an agency statement of general applicability is a rule that must be correctly promulgated in order to be valid and enforceable. A statement of policy or interpretation of law that is intended to have a future effect on unnamed and unspecified persons or facts must be promulgated as a rule. NME Hospitals, Inc. v. Department of Social Services, 850 S.W.2d 71 (Mo. 1993); Bruemmer v. Missouri Dept. of Labor and Industrial Relations,

997 S.W.2d 112 (Mo. App. W.D. 1999). Not every generally applicable statement or announcement of intent by an agency is a rule subject to rule-making procedures, of course. Baugus v. Director of Revenue, 878 S.W.2d 39 (Mo. 1994). But a court is likely to find that a statement is a rule if it affects the rights or duties of individuals who can be described in the abstract. Id.

***Examples of agency statements that could not be enforced unless they were promulgated as rules include the following:***

1. Approval by the Department of Health of methods utilized in state laboratories for determining blood alcohol from blood samples was an attempt to implement law as well as prescribe Department policy; therefore, the Department was required to satisfy statutory publication and filing requirements to adopt such "rule." State v. Peters, 729 S.W.2d 243 (Mo. App. S.D. 1987).

2. An income maintenance manual provision setting forth the method by which the Division of Family Services computed the amount of a medicaid recipient's income to be paid to a nursing home was a "rule." Missouri State Div. of Family Services v. Barclay, 705 S.W.2d 518 (Mo. App. W.D. 1985).

3. The contents of a right-of-way manual used by the Highway and Transportation Commission to determine compensation and relocation payments when properties were condemned for highway purposes was a "rule." Tonnar v. Missouri State Highway and Transp. Com'n, 640 S.W.2d 527 (Mo. App. W.D. 1982).

4. A policy change disallowing costs of psychiatric services other than electric shock therapy from Medicaid reimbursement required promulgation of rule under the state Administrative Procedures Act because the reimbursement policy applied generally to all participants in the Medicaid program. The Missouri Supreme Court held that until this change in the statewide Medicaid reimbursement policy was promulgated as a rule, it could not be made enforceable by contract with health care providers. NME Hospitals, Inc. v. Department of Social Services, Div. of Medical Services, 850 S.W.2d 71 (Mo. 1993).

5. A license fee is a "rule." Kansas Ass'n of Private Investigators v. Mulvihill, 35 S.W.3d 425 (Mo. App. W.D. 2000).

***Examples of agency statements that were NOT rules and therefore were not***

***invalid on the basis that they had not been promulgated pursuant to chapter 536:***

1. A decision by the Missouri Clean Water Commission to include the Missouri and Mississippi Rivers on an "impaired waters list" submitted to the Environmental Protection Agency (EPA) pursuant to federal Clean Water Act was not a "rule" under Missouri Administrative Procedure Act; the list did not establish any standard of conduct having the force of law, it did not command the associations to do anything or refrain from doing anything, and it created no legal rights or obligations. Missouri Soybean Ass'n v. Missouri Clean Water Com'n, 102 S.W.3d 10 (Mo. 2003).

2. A proposal by the Director of Revenue to place the word "prior" before the word "salvage" on a motor vehicle certificate of title was not a rule because the additional word merely communicated the difference between two types of title, and did not substantially affect the legal rights of any party. Baugus v. Director of Revenue, 878 S.W.2d 39 (Mo. 1994).

In several of the above cases the agency unsuccessfully argued that its procedure or practice was not a "rule," but was no more than a guidance, usually for internal use. But the court did not accept this argument if it found that the agency's use of the so-called guidance had an impact on the rights or duties of individuals or upon the procedures available to the general public. A court will likely find a "guidance" document to be an attempt at imposing a rule if it is intended to have a legally binding effect on rights, duties, or procedures related to an agency determinations. If such a "guidance" has not been promulgated as a rule, it will not be enforced as such by a court.

It will be necessary, once a draft rule is available, to review whether any of its provisions are inconsistent with any state statute or provisions of the state or federal constitution. It will also be necessary to ensure that no part of the rule goes beyond the authority of the statutes that grant the Clean Water Commission its powers to promulgate rules. Any conflicting or over-reaching rule provisions will have to be removed, unless the conflict is resolved by enactment of an appropriate change in the higher statutory or constitutional authority.

Obviously, this memorandum is an introduction to these issues, and far from a final analysis. Please share it with the entire workgroup.